FILED
NOV 21 1974
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-429

SIGMA SYSTEMS CORPORATION,
APPLIED SCIENCE INCORPORATED,
C. L. HABERN AND R. E. MORGAN,
v.
Petitioners,

ELECTRONIC DATA SYSTEMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

J. EDWIN FLEMING,
ERNEST E. FIGARI, JR.,
Coke & Coke,
3600 First National Bank Bldg.,
Dallas, Texas 75202,

D. CARL RICHARDS,
Richards, Harris & Medlock,
2420 Republic Nat'l Bk. Tower,
Dallas, Texas 75201,
Attorneys for Respondent.

Of Counsel:
GLEN ADAMS,
7171 Forest Lane
Dallas, Texas 75230

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

	Page
Citations	ii
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
1. Nature of the Case	2
2. The Antitrust Counterclaim	3
3. Antitrust Findings	4
4. Judgment Notwithstanding the Verdict	5
5. The Appeal	6
Argument	6
I. The Decision Below Is Clearly Correct	6
A. No Evidence Defendants Had the Requisite "Business or Property"	7
B. No Evidence of Causal Connection or Injury to Defendants in the Computer Services Business	10
C. No Evidence as to Amount of Damages Purportedly Suffered by Defendants in Computer Services Business	11
II. There is No Important Question of Federal Law	13
Conclusion	14

Cases: Page

Flintkote Co. v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957) 11

Martin v. Phillips Petroleum Co., 365 F. 2d 629 (5th Cir.), cert. denied, 385 U.S. 991 (1966) 8

Stearns v. Tinker & Rasor, 252 F. 2d 589 (9th Cir. 1957) 7

Triangle Conduit & Cable Co. v. Nat'l Electric Prod. Corp., 152 F. 2d 398 (3d Cir. 1945) 7, 8

United States v. Johnston, 268 U.S. 220 (1925) 14

Statutes:

15 U.S.C. § 1 2

15 U.S.C. § 15 ..... 2, 4

28 U.S.C. § 1254(1) 1

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-429

SIGMA SYSTEMS CORPORATION,
APPLIED SCIENCE INCORPORATED,
C. L. HABERN AND R. E. MORGAN,
Petitioners,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (App. A, page A-11, of the Petition) was not reported. The opinion of the Court of Appeals for the Fifth Circuit (App. A, page A-1, of the Petition) is reported at 500 F. 2d 241.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1974. The petition for writ of certiorari was filed on October 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

QUESTION PRESENTED

Whether the findings of the District Court and the Court of Appeals that the evidence was insufficient to support the jury's verdict on several essential elements of petitioners' antitrust counterclaim are correct?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent Constitutional provision (U.S. Const. Amend. VII) and statutory provisions (15 U.S.C. §§ 1, 15) are set forth in the Petition at pages 2-3.

STATEMENT

Defendants Sigma Systems Corporation ("Sigma"), Applied Science Incorporated ("Applied"), C. L. Habern ("Habern") and R. E. Morgan ("Morgan"), petitioners here, seek a third review of the sufficiency of the evidence claimed to support certain findings with respect to the antitrust counterclaim asserted against plaintiff Electronic Data Systems Corporation ("EDS"), respondent here.

1. Nature of the Case.

This suit was brought by EDS for injunctive relief and to recover damages for Defendants' (a) infringement of United States Patent No. 3,515,806 and (b) breach of (i) the written nondisclosure agreement of February 23, 1968, (ii) the written prototype agreements of May 1968 and (iii) Defendants' confidential relationship with EDS.

Alleging violations of the Sherman and Clayton Acts on the part of EDS, Defendants filed a counterclaim with respect

to certain provisions in the prototype agreements of May 1968 which prohibited them from competing with EDS in (a) the portable terminal business and (b) the computer services business.

EDS moved for a directed verdict as to the counterclaim of Defendants at the close of their evidence and again at the close of all the evidence. Both motions were taken under advisement by the District Court and the case was submitted to the jury on special interrogatories. The jury's answers to the interrogatories submitted were partially favorable to EDS and partially favorable to Defendants. EDS moved for judgment notwithstanding the verdict.

Briefs in support of and opposing the motion for judgment n.o.v. were submitted to the District Court which, after some five months of consideration, granted such motion as to Defendants' antitrust counterclaim. Consequently, Judgment was entered by the District Court (a) exonerating Defendants of infringing the Patent, (b) invalidating two of three claims of the Patent, (c) awarding actual and punitive damages to EDS for Defendants' malicious breach of their confidential relationship with EDS, and (d) dismissing with prejudice the counterclaim of Defendants.

Defendants filed a notice of appeal from the Judgment, and EDS thereafter filed a notice of cross-appeal. The Court of Appeals affirmed the Judgment of the District Court in all respects.

2. The Antitrust Counterclaim.

In their antitrust counterclaim Defendants sought actual

damages of $8,228,000 for alleged violations of the Sherman and Clayton Acts on the part of EDS (R 47).[1] According to their pleadings, the damages resulted from Defendants being forced out of (a) the portable terminal field[2] and (b) the computer services business[3] by a temporary injunction issued by a Texas State Court at the instance of EDS (R 45-47).

In reply to the counterclaim, EDS denied having violated the Sherman and Clayton Acts and having caused Defendants to suffer any damages (R 49). EDS also affirmatively alleged that Defendants' lacked standing, that is, sufficient "business or property" under Section 4 of the Clayton Act, 15 U.S.C. § 15, to maintain the antitrust counterclaim (R 49).

3. Antitrust Findings.

After two weeks of testimony, the District Court submitted the case to a jury on special interrogatories. As regards Defendants' antitrust counterclaim, the jury found that the covenant prohibiting Defendants from competing with EDS in the portable terminal business was reasonable, and that Defendants lacked the requisite "business or property" to assert an antitrust claim based thereon (R 158, 160).

---

[1] Citations to the printed Appendix in the Court of Appeals will be indicated by an "R" followed by the page numbers to which reference is made. Plaintiff's exhibits will be designated by the letter "P" and Defendants' exhibits by the letter "D," followed by the specific exhibit number and a citation to the page of the exhibit volume of the Appendix where the exhibit appears.

Unless otherwise indicated, all emphases are supplied by counsel.

[2] Portable terminals are "hardware" — "those things that you can touch, the actual hard equipment" (R 188).

[3] "The field of computer services generally defines an organization or a company that is established to provide those services that are required to define, design, program, implement and operate computers in the solution of problems" (R 346).

The jury found that the contractual restraint against Defendants competing with EDS in the computer services business was unreasonable, and that the restraint caused economic injury to Defendants (R 158, 159). The jury returned findings that Applied and Sigma were damaged in the sum of $200,000 each, and Habern and Morgan in the sum of $5,000 each (R 159). As regards the computer services business, the jury found Defendants to have had the requisite "business or property" (R 160).

4. Judgment Notwithstanding the Verdict.

Subsequently, EDS filed a motion for judgment notwithstanding the verdict (R 162-72). Granting the motion with respect to Defendants' computer services counterclaim, the District Court concluded:

> "The jury found that the agreement not to compete with EDS by entering the computer services business imposed a greater restraint upon interstate commerce than was necessary to protect EDS (Question 33b), that the defendants had sufficient business or property to entitle them to maintain this antitrust claim (Question 36a) and that defendants were caused to suffer economic injury to such business or property in the amount of $410,000 (Questions 34b and 35).
>
> *"The court is of the opinion that the findings of the jury that defendants had standing to bring this antitrust claim (Question 36) and suffered injury and damages to their business or property by reason of the agreement not to enter the computer services business (Questions 34b and 35) are not supported by substantial evidence"* (App. A-15; R 180-81).

Thus, because of a lack of evidence to support the existence of (a) injury, (b) causal connection, (c) amount of damages,

and (d) standing as regards the "computer services" claim, the District Court dismissed Defendants' antitrust counterclaim (App. A-19; R 184).

5. The Appeal.

The Court of Appeals was presented 200 pages of briefs on appeal, a large portion of which was directed to the question now before this Court. Its consideration of petitioners' appeal specifically included "a thorough review of the entire proceedings" and "a step-by-step examination of the jury's answers to the interrogatories as they related to the evidence" (App. A-7). Finally, after having the case under advisement for some six months, the Court of Appeals rendered its decision. With respect to the District Court's dismissal of the computer services counterclaim for lack of evidence, the Court of Appeals held:

> "This court's examination and analysis of the evidence causes us to conclude that the trial judge was well within his discretion and used sound judgment in making such a ruling" (App. A-10).

Consequently, the Court of Appeals concluded that "[t]he decision of the district court, the memorandum opinion and the district court's order are in all respects correct" (App. A-10).

ARGUMENT

I.

The Decision Below is Clearly Correct

After hearing the testimony during a two weeks trial of this case, and a searching examination of the record in

considering EDS's motion for judgment n.o.v., the District Court concluded that the evidence was lacking in support of several elements of Defendants' computer services counterclaim — any *one* of which would defeat recovery.

A close scrutiny of the record by the Court of Appeals — which included "a thorough review of the entire proceedings" and "a step-by-step examination of the jury's answers to the interrogatories as they relate to the evidence" (App. A-7) — resulted in an across-the-board affirmance of the District Court (App. A-10). The evidence in the present case demonstrates the decision below is clearly correct.

A. No Evidence Defendants Had the Requisite "Business or Property"

Section 4 of the Clayton Act authorizes the recovery of treble damages only when a person is injured in his "business or property" as a result of a violation of the federal antitrust laws. *E.g., Stearns v. Tinker & Rasor,* 252 F. 2d 589 (9th Cir. 1957); *Triangle Conduit & Cable Co. v. Nat'l Electric Prod. Corp.,* 152 F. 2d 398 (3d Cir. 1945). Although they clearly had the burden of proof on this point, Defendants completely failed to adduce any evidence which supported their standing with respect to the computer services business. To the contrary, the evidence conclusively shows that Defendants were not in the computer services business, did not intend to engage in it and did not have personnel or finances sufficient to enter the field. In short, the Defendants lacked the requisite standing.

Indeed, the Defendants admitted that they had never been and were not engaged in the computer services business (R 349, 510-11, 732). According to its President, Sigma was

"engaged primarily in building instrumentation for the aerospace industry" (R 731). Applied, on the other hand, "was not an operating company" — it simply owned all of the stock of Sigma (R 783). Consequently, when Defendant Morgan was asked:

> "Q To your knowledge, did any of the Defendants in this lawsuit engage in the computer services business?"

he replied:

> "A Not to my knowledge" (R 511).

The testimony of Morgan in this respect was fully corroborated by the President of Sigma (R 732) and other witnesses (R 348-49, 459).

Even if a claimant under the federal antitrust laws has not suffered injury to an existing business, he may nevertheless have standing to maintain an action if he had the necessary intent and preparedness to enter the field. *E.g., Martin v. Phillips Petroleum Co.*, 365 F. 2d 629, 633 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966); *Triangle Conduit & Cable Co. v. National Electric Prod. Corp.*, 152 F. 2d 398 (3d Cir. 1945). In the present case, however, the Defendants had *neither* the intent *nor* the preparedness to enter the computer services field.

The record is barren of any evidence that Defendants ever made any preparations or had the capability to enter the computer services business. The testimony of the President of Sigma on this point is most relevant:

> "Q Now, at any time that you were connected with Sigma Systems, was Sigma or Applied Science ever equipped to enter into the computer services business?

"A No.

"Q Either from the standpoint of personnel or equipment?

"A No" (R 733).

Establishing beyond doubt that Sigma did not have sufficient financial resources to enter the computer services business, the Comptroller of Sigma stated:

"Q Did Sigma have the financial stamina to go into the computer services business in your opinion?

"A At that time the cash was not available to do it" (R 771).

The evidence is also conclusive that the Defendants never took any affirmative steps to engage in the computer services business. When Morgan, Vice President of Sigma, was asked:

"Q Were any preparations ever made at Sigma to go into that business [*i.e.*, the computer services business]?"

he responded:

"A Not that I am aware of" (R 511).

Moreover, the President of Sigma admitted that Defendants never intended to go into the computer services business:

"Q At any time that you were connected with Sigma, do you know of anyone at Sigma or Applied Science who expressed an intention to enter into the computer services business?

"A I do not recall anybody suggesting that we go into the computer services business" (R 733).

This testimony was verified by Morgan (R 504-05) and other witnesses (R 349, 459).

Final and conclusive confirmation that Defendants never

intended to enter the computer services business came from counsel for Defendants:

> "MR. JAMES [*i.e.*, counsel for Defendants]: Your Honor, we object to this line of questioning as being no — having no absolutely, no relevancy. *The witness testified he knows of no instance where Sigma attempted to go into the computer services business, and it has absolutely no bearing on this case. We don't claim we went into it; they don't claim we went into it; there could be no question —*" (R 461).

As counsel for Defendants aptly noted, "there could be no question." The conclusion is inescapable that Defendants never had any intent or plans to enter the computer services business.[4]

B. No Evidence of Causal Connection or Injury to Defendants in the Computer Services Business

A thorough review of the record in this case reveals a complete absence of any evidence that Defendants were caused any injury by the covenants not to compete with EDS in the computer services business. The record is devoid of any evidence that the Defendants were deprived of any

---

[4] In addition to the reasons advanced above, Applied, Habern and Morgan, as the shareholder and officers, respectively, of Sigma, lack standing to sue under Section 4 of the Clayton Act. Applicable here is the rule of remoteness that "shareholders, officers and creditors of corporations, suing for diminution in value of ownership, loss of earnings or impairment of corporate ability to pay, caused by the impact of antitrust conduct on the corporation" lack standing to sue. Waldron v. British Petroleum Co., 231 F. Supp. 72, 85 (S.D. N.Y. 1964), citing several cases including Martens v. Barrett, 245 F. 2d 844 (5th Cir. 1957), and Bookout v. Schine Chain Theatres, Inc., 253 F. 2d 292 (2d Cir. 1958).

As previously mentioned, Applied is a non-operating company which, as the parent of Sigma, guaranteed performance by Sigma under the prototype agreement of May 1968 (P-38, R 61-62). Applied is merely

contracts or revenues in the computer services field. The total lack of evidence on this point is hardly surprising since the record conclusively shows that Defendant conceded they were not engaged in and did not have either the plans or preparedness to engage in the computer services business. As a result, nowhere in the record does the jury's finding that Defendants were caused injury in the computer services business find any support.

C. No Evidence as to Amount of Damages Purportedly Suffered by Defendants in Computer Services Business

The record discloses not only no proof of the fact of damage, but also no basis whatsoever for the jury to infer the *amount* of damages. In the absence of any probative evidence on the fact of damage to any person covered by Section 4 of the Clayton Act, there is no question of fact as to the amount of damages for the jury to decide. "[T]he fact of injury must first be shown before the jury is allowed to estimate the amount of damages." *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957).

There is no evidence of any "lost net profits" of Sigma from computer services for the obvious reason that it neither engaged nor intended to engage in the computer services

---

the sole *shareholder* of Sigma and as such lacks standing to sue for any "injury" to Sigma (R 282, 726, 782-83). Defendants Habern and Morgan were *officers* who signed individual prototype agreements in the course of their employment duties for Sigma and as such also lack standing to sue for any "injury" to Sigma. As of the time of the filing of the counterclaim, Habern was still an officer of Sigma and thus had no individual claim (R 555-56, 782, 826). Morgan did not leave Sigma until three days before this litigation commenced and thus could never have been personally "injured" in his "business or property" (R 546).

business. Moreover, no attempt was made to show net profits of a comparable going concern in the computer services field. Instead, the record demonstrates that Sigma never earned a profit in its own field of high technology, electronic products (R 784-85). Indeed, by the summer of 1970 Sigma's losses exceeded $400,000 (R 785). Significantly, both the President and Comptroller testified that Sigma was "insolvent" throughout the period of their association with the company (R 746-47, 768).

Notwithstanding this undisputed proof, the jury found that Sigma was damaged in the amount of $200,000 by the covenant not to compete with EDS in the computer services field. Where Sigma suffered losses in the electronic products area, lacked capital in its own business, made no attempt to enter the computer services field and offered no comparison of companies in the computer services business in competition with EDS, no reasonable man could have arrived at damages of $200,000. It is nothing short of ludicrous for the jury to have awarded an additional $200,000 to Applied — "a non-operating entity" which is merely a shareholder of Sigma (R 282, 782-83). The jury further compounded its error by awarding $5,000 to Morgan, presumably based on the amount of wages owed him by Sigma at the time he left — which coincided with the filing of the present suit (R 500, 542). Just as it did in assigning the same amount to Applied as to Sigma, the jury gave Habern the same $5,000 recovery as Morgan. On the basis of the present record, the District Court and Court of Appeals quite properly disregarded the damage findings.

II.

There is No Important Question of Federal Law

The sole question in this case turns on the sufficiency of the evidence to support certain essential elements of petitioners' counterclaim pertaining to the computer services business. The District Court and the Court of Appeals concluded that the evidence was lacking. Petitioners insist, however, that implicit in these evidentiary evaluations lurk "common, significant and undecided issues under the federal antitrust laws" (Petition, p. 7). Indeed, according to petitioners, this case offers "a uniquely favorable opportunity" for this Court to issue a statement of "the principles applicable to private antitrust actions based on unreasonable covenants not to compete" (Petition, pp. 11, 14). Finally, in an effort to embellish this invitation, petitioners go so far as to suggest that "the decisions below threaten the effectiveness of the private remedy for enforcing the antitrust laws" (Petition, p. 11).

Despite petitioners' entreaties, the question of whether "a contract containing an unreasonable covenant not to compete violates Section 1 of the Sherman Act" is never reached (Petition, p. 11). Indeed, the decisions of the District Court and Court of Appeals did not even address the finding of the jury that the computer services covenant was an unreasonable restraint of commerce.

The short answer to petitioners' contentions is that the correctness of the decision below rests solely on an examination and analysis of the evidence in the present case. It has not

been the practice of this Court to grant a certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). No important question of federal law is present here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petiton for writ of certiorari should be denied.

Respectfully submitted,

J. EDWIN FLEMING,
ERNEST E. FIGARI, JR.,
Coke & Coke,
3600 First National Bank Bldg.,
Dallas, Texas 75202,

D. CARL RICHARDS,
Richards, Harris & Medlock,
2420 Republic Nat'l Bk. Tower,
Dallas, Texas 75201,
Attorneys for Respondent.

Of Counsel:
GLEN ADAMS,
7171 Forest Lane
Dallas, Texas 75230